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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 446

IN THE MATTER

of

The Accounting of Joseph Polizzo, as Committee of the Estate of MINNIE POLIZZO, an Incompetent.

AGNES W. TYMANN, as Administratrix of the Estate of MINNIE POLIZZO, Deceased,

Petitioner,

HARRISON B. WRIGHT, Individually, and as Executor of JOSEPH POLIZZO, Deceased, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO NASSAU COUNTY SUPREME COURT OF NEW YORK STATE AND TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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PETITION FOR A WRIT OF CERTIORARI TO NASSAU COUNTY SUPREME COURT OF NEW YORK STATE AND TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

Petitioner prays that a writ of certiorari issue to review the decision of the Court of Appeals of N. Y. dated May 26th, 1955. The remittitur of the Court of Appeals was filed in the Nassau Co. Supreme Court June 10, 1955 but judgment was never entered thereon.

Citations to Opinions Below

The opinion of the Hon. Peter M. Daly, trial justice of the Supreme Court of Nassau County, New York (41), is unreported. The opinion of the Appellate Division of the Supreme Court of New York, 2nd Department, reported at 284 A. D. 812, 132 N. Y. S. 2nd 295 (113-115). The opinion of the Court of Appeals of New York is reported at 308 N. Y. 517, 127 N. E. 2nd 316.

Jurisdiction

The decision of the Court of Appeals was rendered on the 26th day of May 1955. A timely petition for a rehearing was filed on or about June 10th, 1955 and was denied on July 8, 1955. The jurisdiction of this Court is invoked under Title 28, Sec. 1257, Sub. (3) of the U. S. C. since a right and privilege under the Fourteenth Amendment, Section 1 of the United States Constitution has been denied.

The Court of Appeals of New York has failed to accord to the funds of married women equal treatment to the funds of married men.

Question Presented

Is it a denial of equal protection of the law to hold a transfer of a bond and mortgage, without consideration, by husband to himself and his wife creates a presumption that he intended to give her only a right of survivorship and that a like transfer of a bond and mortgage by a wife to herself and her husband does not raise such a presumption?

Statute Involved

The constitutional provision involved is Article XIV Section 1 of the United States Constitution.

> "* * * Nor shall any state deny to any person within its jurisdiction the equal protection of the laws."

Facts

Amelia Anna Wigger, also known as Minnie Wigger, owned a bond and mortgage in her own name prior to her marriage (282). After her marriage to Joseph Polizzo in 1917 she transferred the bond and mortgage from her name to the name of herself and her husband without the payment of any consideration by the husband (283-288). The printed habendum clause of the assignment contained the typewritten words "the survivor, such survivors, heirs" (293).

Minnie Polizzo subsequently became incompetent and was continuously in a State mental institution from 1928 until her death in 1953 (304). In 1947 her husband who had been appointed her committee made a purported assignment of a one-half interest in said bond and mortgage to his attorney, one Harrison B. Wright (278). The recited consideration of $8,500.00 was not paid (116). No consideration was proved at the trial (112-117).

In 1948 Joseph Polizzo predeceased Minnie Polizzo. In November 1949 a motion was made to punish Harrison B. Wright, his executor, for contempt for failure to file an account (121). Harrison B. Wright filed an account as executor of the Estate of Joseph Polizzo in 1951. William B. Hoffman, the Special Guardian for Minnie Polizzo the incompetent filed objections to the account on the ground that it only accounted for one half of the mortgage instead of the whole thereof (92).

How Federal Question Presented

The Supreme Court of Nassau County, New York, by the Hon. Peter M. Daly held that the transfer of a bond and mortgage by Minnie Polizzo to herself and her husband without payment of any consideration by the husband, in the absence of any proof to the contrary, created a presumption that she only intended to give her husband survivorship rights. The Appellate Division reversed the Supreme Court and held that all such transfers create a joint tenancy. And that the transfer of one-half of the mortgage which had been the sole property of Minnie Polizzo was good. The Court of Appeals, in a split decision, affirmed the Appellate Division but gave a surprise reason.

The Court of Appeals by a Court divided 4-3 held that a transfer by a *husband* to himself and his wife without payment of any consideration, in the absence of any proof to the contrary, creates a presumption that the wife is to have survivorship rights alone. The majority of four judges held that since in this case the assignor was a *wife*, not a husband, the presumption should not apply due to the Common Law origin of the rule. Thus the denial of the equal protection of the law did not arise until the decision of the Court of Appeals. A motion for reargument was made on or about June 10, 1955 and denied July 8th, 1955. In the motion for reargument of the decision of the Court of Appeals petitioner argued that the decision of the majority was contrary to Amendment XIV, Section 1, of the United States Constitution, in that the decision failed to accord the funds of married women equal treatment with the funds of married men. In the brief, petitioner set forth the section relied upon in full as follows:

Article XIV, Section 1

> "Nor shall any state deny to any person within its jurisdiction the equal protection of the laws."

The Motion for Reargument and the supporting brief are set forth in the Appendix herein and a certified copy filed with the Record on Appeal. See *William J. McGarrity* v. *Delaware River Bridge Commission,* 292 U. S. 19, 545 Sup. Ct. 565, 78 L. Ed. 1095.

Reason for Granting Writ

During the period from 1848 to 1877 both in the United States and in England many drastic changes in the law concerning the rights of married women were enacted. In 1869 Congress enacted for the benefit of married women in the District of Columbia one of the most radical laws on the subject. The last state to enact a married woman's act was Virginia in 1877. (See Vol. 1, pp. 310-315 of Schouler on Marriage, Divorce and Domestic Relations, 6th Edition.) The Fourteenth Amendment to the United States Constitution became law on July 28, 1868. The spirit of the times shows that the intention of the draftsmen of the Fourteenth Amendment was to include women within the meaning of the words: "Nor shall any state deny to any person within its jurisdiction the equal protection of the laws." (See *Carrithers* v. *City of Shelbyville,* 126 Ky. 769, 104 S. W. 744.)

It is true that a state can make a distinction in the law between men and women but such distinction must be founded upon a reasonable basis having in mind the general welfare of public morals. An example of such a law is the prohibition of employment of women at tending bar (See 172 A. L. R. 620). Surely a property right in a bond and mortgage is not the proper field for a differentiation between married men and married women. See *Adkins* v. *Childrens Hospital,* 24 A. L. R. 1238, 261 U. S. 525, 67 L. Ed. 785, 43 S. C. 394.

A presumption of law is a rule which requires that a particular inference must be drawn from an ascertained state of facts (See *Platt* v. *Elias,* 186 N. Y. 374, 379).

The application of a presumption to a certain set of facts concerning property rights of a married man and the failure to apply the same presumption to the same set of facts concerning a married woman is clearly an arbitrary and unreasonable violation of the express intent and the words of the Fourteenth Amendment. In this case the minority of the three judges said at 127 N. E. 2nd 320:

> "Fairness dictates that married women should be accorded equal treatment."

It is respectfully submitted that such fairness is required by the commandment of the Fourteenth Amendment.

The basis for the decision of the four judges as set forth by Judge Desmond was the common law rule that a husband owned all of his wife's personalty. The same Judge Desmond in the case of *People* v. *Morton,* 308 N. Y. 96, 98, in December 1954 conceded that the common law rule, "no longer had any existence." Regardless of whether this common law rule is in existence or not, when the common law is contrary to the Constitution of the United States, the common law must yield. 11 Am. Jur. Sec. 4, page 157. Research has failed to disclose a case in point with the one at bar since this is a novel question, but good sense, sound reason and the plain meaning of the English language all show that the 4-3 decision of the New York Court of Appeals is contrary to the Constitution of the United States.

This case has already received much notice in legal circles and in fact appeared upon the front page of the New York Law Journal on August 18, 1955. The case was briefed in the New York State Bar Association Lawyers Service Letter 203 on June 9, 1955. Furthermore, counsel has been advised that this case will be the subject of

an article in the fall issue of the St. John's Law Review, and also will be the subject of an article or a law note in the fall issue of the Fordham Law Review. Columbia Law Review is also considering commenting on this case.

Common knowledge shows that much family property is held in the joint names of husband and wife. The Statistical Abstract of the United States for 1954 at page 52 shows that in 1950 there were almost four million married women in New York State. Therefore, this question is important since it affects much property and many people.

CONCLUSION

Failure to accord the same presumption to the property of a married woman as is applied to the property of a married man is a violation of the 14th Amendment to the United States Constitution.

Wherefore, for the foregoing reasons, this petition for certiorari should be granted.

Respectfully submitted,

WILLIAM B. HOFFMAN,
Counsel for Petitioner.

APPENDIX A

Opinion.

STATE OF NEW YORK
COURT OF APPEALS

No. 32.

IN THE MATTER

of

The Final Account of Proceedings of Joseph Polizzo, as Committee of the Estate of MINNIE POLIZZO, an Incompetent Person and an Inmate of the Pilgrim State Hospital.

HARRISON B. WRIGHT, individually and as Executor of the Last Will and Testament of JOSEPH POLIZZO, deceased,

Respondent,

AGNES W. TYMANN, as Administratrix of the Estate of Minnie Polizzo, deceased,

Appellant,

CENTURY INDEMNITY COMPANY,

Nominal Party.

DESMOND, J.,:

When Minnie (sometimes called Amelia or Amelia Anna) Wi[illegible]er married Joseph Polizzo in 1917, she owned

in her own right and her own name a $20,000 bond and mortgage. Shortly after her marriage she assigned the bond and mortgage to one Bautz, an attorney, the stated consideration being $100, and at the same time Bautz, for an expressed consideration of $100 "paid by Joseph Polizzo and Amelia Anna Polizzo, his wife, parties of the second part" assigned the bond and mortgage to the parties of the second part. The habendum clause in the latter assignment was, in full, as follows:

> "To HAVE AND TO HOLD the same to the party of the second part, and to the successors, legal representatives of the survivor, such survivor's heirs, assigns of the party of the second part, forever, subject only to the provisions in said indenture of mortgage mentioned."

Attorney Bautz, as is obvious, acted only as a conduit. There is no evidence that the husband paid his wife anything for the transfer. The question of law on this appeal is: did the husband acquire a present joint ownership in the bond and mortgage, or a right of survivorship only, as to it?

Minnie Polizzo became incompetent in 1928, remained incompetent, and was a patient in a mental hospital till her death in 1953. Her husband, although not appointed as committee of her property till 1945, managed her affairs, including this bond and mortgage. The husband died in 1948. In the present proceeding, which is an accounting by Joseph's executor as to Joseph's committeeship, a dispute arose as to the ownership of the bond and mortgage above described. In 1947, Joseph Polizzo had executed and delivered to Harrison B. Wright (who was his attorney and is now his executor accounting here as to Joseph's proceedings as committee of the latter's wife) an assignment or purported assignment of a one-half interest in

the bond and mortgage. The assignment recites a consideration of $8,500, one-half the amount of the bond and mortgage as somehow reduced by $3,000 during Minnie's life. Special Term held that Joseph Polizzo, the husband, never had more than a survivorship interest in the bond and mortgage, and that, accordingly, and since he predeceased his wife, he had no assignable interest therein, and that nothing passed by his assignment to respondent Wright. The Appellate Division, however, held unanimously that the assignment from Attorney Bautz to Polizzo and his wife created a joint tenancy in the bond and mortgage, each thereafter owning an undivided half interest therein, and that the husband's assignment to Wright was effective to terminate the joint tenancy, and that, thereafter, Wright and Mrs. Polizzo were owners in common. We agreed with the Appellate Division.

If Minnie and Joseph had not been wife and husband at the time of the assignment of the mortgage to them, they would have become joint tenants with right of survivorship, and with the further right in each of them to terminate the joint ownership and create a tenancy in common, by conveying his or her interest to a third party (*Matter of Suter*, 258 N. Y. 104, 106). If the bond and mortgage had been owned originally by the *husband* and he had assigned it to himself and wife during marriage, or if he furnished the consideration and arranged to have it made to himself and his wife (with no inconsistent habendum clause, see second last paragraph of this opinion), then there would apply a presumption, in the absence of proof to the contrary, that the husband intended that his wife have a survivorship right only, and not present ownership of one-half, or of any other part (*Matter of Albrecht*, 136 N. Y. 91; *West* v. *McCullough*, 123 App. Div. 846, aff'd 194 N. Y. 518; *Matter of McKelway*, 221 N. Y. 15; *Matter of Kane*, 246 N. Y. 498; *Belfanc*,

252 App. Div. 453, aff'd 278 N. Y. 563). But none of those cited cases, and no others we find, deal with a transfer from a *wife* to her husband, without proof of consideration or specific intent. In the *West* case (123 App. Div. 846, 847, 848, 849, *supra*), it is explained that the rule creating the presumption above described (and operative as to a husband-to-wife transfer) is an aspect or result or vestige of the common-law rule that a husband owned all his wife's personalty, and that thus, when he purported to pass to her an interest in his own personalty, he could not have intended to give her anything greater than a right of survivorship. And consideration or lack thereof, in those common-law situations, had nothing to do with the matter, since the wife's personalty was the husband's, and so he would always be furnishing the consideration. But none of that historical theory has any impact on a modern day transfer by a wife of her own personal property to herself and her husband, jointly. The question seems to be of first impression in this Court. We might, therefore, choose to use the old (husband-to-wife transfer) presumption, in the absence of proof as to actual intent, that survivorship only was intended. But, since that presumption is a remnant only of a body of law that never did apply to transfers from wife to husband, we see no reason for giving it a new application to a new situation. In other words, we decline to enlarge the coverage of the old presumption. Therefore, and since the assignment to Joseph Polizzo and Minnie Polizzo would have created a present joint tenancy had they been unmarried we hold that the same kind of tenancy was created, notwithstanding their marital relationship.

There is nothing in the above-quoted language of the habendum clause in the assignment from Bautz to the Polizzos to require a different result. That inartistically

drawn clause reads "to the party of the second part, and to the successors, legal representatives of the survivor, such survivor's heirs, assigns of the party of the second part". Presumably the words "the survivor, such survivor's heirs" were dropped into the middle of the customary verbiage to show an intent that on the death of either husband or wife, the whole bond and mortgage should become the property of the survivor. But the very same clause makes the assignment run to "assigns of the party of the second part", and that language expresses the transfer of a present interest to the "party" of the second part.

The order should be affirmed, with costs to appellant payable out of the estate.

Appendix A.

Dissenting Opinion.

STATE OF NEW YORK

COURT OF APPEALS

No. 32.

IN THE MATTER

of

The Final Account of Proceedings of Joseph Polizzo, as Committee of the Estate of MINNIE POLIZZO, an Incompetent Person and an Inmate of the Pilgrim State Hospital.

HARRISON B. WRIGHT, individually and as Executor of the Last Will and Testament of JOSEPH POLIZZO, deceased,

Respondent,

AGNES W. TYMANN, as Administratrix of the Estate of Minnie Polizzo, deceased,

Appellant,

CENTURY INDEMNITY COMPANY,

Nominal Party.

BURKE, J.:

The question presented by this appeal is whether it is presumed that there is an intention to create a right of survivorship only and not a joint tenancy in a mortgage,

when the mortgage is in the names of both the husband and the wife and the entire consideration therefor was paid by the wife from her separate funds.

In 1912 John E. Wigger and Amelia Anna Wigger, brother and sister, owned a mortgage in the amount of $20,000. Thereafter, John Wigger died and his executor in 1916 transferred an undivided one-half of such bond and mortgage to Amelia Anna Wigger, the expressed consideration being $10,000.00.

Amelia Anna Wigger married Joseph Polizzo one year later and in August of 1917, as Amelia Anna Polizzo (also referred to in this proceeding as Minnie) transferred to Louis M. Bautz, an attorney, the bond and mortgage for the consideration of $100.00 and at the same time said Louis M. Bautz, in consideration of $100.00 and without recourse, assigned the mortgage to "Joseph Polizzo and Amelia Anna Polizzo, his wife". The habendum clause read as follows:

> "TO HAVE AND TO HOLD the same to the party of the second part, and to the successors, legal representatives *the survivor, such survivor's heirs,* assigns of the party of the second part, forever, subject only to the proviso in said indenture of mortgage mentioned." (The italicized words were typed in on the printed form.)

These assignments were recorded simultaneously on August 16, 1917.

In 1927 the land was sold to the Salus Realty Corporation. Salvatore Massucci, the president of this corporation, testified that he made all the interest checks payable to "Joseph Polizzo and Amelia Polizzo" until Joseph Polizzo instructed him to make half the payments to Harrison B. Wright, the respondent-accountant in this proceeding.

Appendix A.

On July 1, 1928 Amelia Polizzo was committed to a mental institution, where she remained until her death in 1954. In 1945 Joseph Polizzo was appointed the Committee of his wife.

In 1942 Joseph Polizzo agreed with Massucci to reduce the principal of the mortgage by $3,000, reduce the interest from 5% to 4½% and extend the time of payment to July 1, 1947.

By an assignment dated September 10, 1947, Joseph Polizzo "in consideration of $8,500 paid by Harrison D. Wright" assigned to Wright "all of my right, title and interest, being a one-half share therein, of, in and to" the mortgage in question.

Joseph Polizzo died on November 2, 1948, leaving a will which was admitted to probate in the Nassau County Surrogate's Court and letters testamentary were issued to Harrison B. Wright, on July 20, 1949.

The surety on the Polizzo committee bond moved to punish Wright for contempt for failure to file an account of the proceedings of Joseph Polizzo as committee from the date of his appointment to the date of his death, as directed by an order of the Supreme Court entered in November, 1949. In January, 1951, the account was filed in the office of the Clerk of the County of Nassau. Thereafter, in June, 1951, the Special Guardian for the incompetent filed objections to the account on the ground that it only included one-half of the mortgage in question instead of the whole thereof.

Two hearings were held on the question of ownership of the mortgage; the first in June, 1951, after which Special Term held that the entire mortgage was the property of the estate of the incompetent and that her husband had only a right of survivorship.

Thereafter, Harrison B. Wright, the assignee of one-half of the mortgage, not being a party to the proceeding,

was permitted to intervene individually and a further hearing was thereupon held and the court adhered to its original decision.

The Appellate Division modified the order of the Supreme Court insofar as it held that the mortgage was the property solely of the Estate of Amelia Polizzo, finding that the assignment to the husband and wife, by its terms, created a joint tenancy in the mortgage whereunder each owned an undivided one-half interest therein and that said tenancy was terminated by the husband's assignment of his interest to Wright, whereby Wright and the wife became tenants in common.

The rule in this state has always been that as assignment of a chose in action, whether a bank account, a bond and mortgage, a note or other investment in personalty, taken in the joint names of husband and wife, conferred on the wife only the right to succeed by survivorship, when the entire consideration was paid by the husband or there was a gift by a husband to his wife of an interest in property belonging solely to himself. *Matter of Albrecht,* 136 N. Y. 91; *West* v. *McCullough,* 123 App. Div. 846; 194 N. Y. 518, *Matter of Kane,* 246 N. Y. 498; *Belfranc* v. *Belfranc,* 252 App. Div. 453, aff'd 278 N. Y. 563. In such cases husband and wife never became joint tenants in the strict sense. From such a transaction without proof of a different intent declared at the time of the transaction, it is presumed that the husband intended to benefit his wife with the ownership of the property at his death, but retaining the complete ownership, control and right of disposition. The presumption would not exist in the absence of the relation of husband and wife. Indeed, it would not exist in the absence of evidence that the consideration was paid by the husband or that there was a gift of an interest in property belonging solely to the husband. Thus, there are two conditions required; the

marital relationship and the creation of the security from the sole money or property of the husband. All the cases cited were decided a half a century or more subsequent to the enactment of the various acts for the benefit of married women, under which married women were to be regarded as if they were sole with respect to their property rights. Nevertheless, this Court called on the presumption to defeat the claims of married women, disregarding the change in status of married women since the abolition of the common law restrictions. Fairness dictates that married women should be accorded equal treatment. Although there is a lack of authority relating to a transfer from a wife to a husband, there are no sound reasons to apply a double standard in order to justify a refusal to extend the presumption to transfers or transactions wherein the property of the wife was the subject of the transaction. The contention that the presumption is anachronistic in that it flows from the common law restriction on a married woman's ownership of property is without substance, because the presumption cannot be invoked, unless, in addition to the marital relationship, the donor spouse is shown to have paid the consideration or made a gift of solely owned property. *Matter of Blumenthal,* 236 N. Y. 448. Moreover, the presumption can be rebutted not only by a showing of a contrary intent at the time the transfer took place but also by proof that the consideration was not solely supplied by the husband. *Matter of Kane,* 246 N. Y. 498, 504. Surely, an inquiry into who paid the consideration, has not the slightest relation to married women's property rights under the common law. Rather it seeks a clue as to the donor's intent. Without proof of different intent, it can not be assumed that such donors intended to give their spouses such control over the donated asset that he or she may alienate one-half of it without the permission of the spouse

who supplied the *sole* consideration for the asset. Such an assumption igores the unity of the marital relationship.

The evidence offered at the trial by the respondent did not rebut the presumption arising from the origin of the mortgage and the relationship of husband and wife. Since the mortgage was originally the family property of the Wiggers, brother and sister, and since the habendum clause of the assignment to the husband and wife contained the typewritten words added to the usual printed form "the survivor, such survivor's heirs", the burden of proof was on the respondent to establish an intention to create a joint tenancy. The public records showed the mortgage to be the sole property of the wife prior to the assignment to the husband. The proof of the gift by the wife of property, solely belonging to her, makes out a prima facie case of a joint tenancy with a right of exclusive present enjoyment in the wife and a right of survivorship in the husband. The added words "the survivor, such survivor's heirs" without further explanation express an intention to limit the ownership of the mortgage. The evidence, adduced by the respondent as to the payment of interest checks to Joseph and Amelia Polizzo and as to the supervision by the husband of the mortgage extensions, is insufficient to overcome the inference that the wife retained the right of exclusive present enjoyment. The proof of interest payments and the servicing of the mortgage by the husband were not inconsistent with the wife's ownership of the mortgage, particularly since the wife was, with the exception of a few months, an inmate of a mental institution. There are no special equities to be weighed, the respondent was aware of the mental illness of the wife, and the fiduciary relationship of the husband as committee of the estate of the wife. The words in the habendum clause of the assignment to the husband and

wife "the survivor, such survivor's heirs" effectively gave notice to a prospective purchaser of a possible limitation on the right of the husband to transfer anything other than rights to be acquired by survivorship. In the case before us we find that there was an intention to create a right of survivorship and not a true joint tenancy. Section 66 of the Real Property Law comes into operation only in the absence of other evidence. Consequently *Matter of Kimberly,* 150 N. Y. 90 and *Matter of McKelway,* 221 N. Y. 15, are not applicable. *Matter of Kimberly, supra,* holds that a bequest to three people, silent as to whether it is a joint tenancy or a tenancy in common, must be deemed to be a tenancy in common. In *Matter of McKelway, supra,* there was no proof as to the source of the consideration.

These views lead to a reversal of the order of the Appellate Division.

Fuld, Froessel and Van Voorhis, JJ., concur with Desmond, J.; Burke, J., dissents in an opinion in which Conway, Ch. J., and Dye, J., concur.

Order affirmed, with costs to all parties appearing separately and filing separate briefs payable out of the estate.

Appendix A.

Opinion of Appellate Division.

NOLAN, P.J., WENZEL, MACCRATE, SCHMIDT AND MURPHY.

SUPREME COURT

STATE OF NEW YORK

APPELLATE DIVISION—SECOND DEPARTMENT

IN THE MATTER

of

The Final Account of the Proceedings of Joseph Polizzo, as Committee of the Estate of MINNIE POLIZZO, an Incompetent Person and an Inmate of Pilgrim State Hospital.

HARRISON B. WRIGHT, individually and as Executor of the Last Will and Testament of JOSEPH POLIZZO, deceased,

Appellant,

AGNES W. TYMANN, as Administratrix of the Estate of Minnie Polizzo, deceased,

CENTURY INDEMNITY COMPANY,

Respondents.

Proceeding by the executor of Joseph Polizzo, as committee of the estate of Minnie Polizzo, his wife, an incompetent person, to settle the final account of said committee. It appears that prior to her marriage Minnie Polizzo was the sole owner of a certain mortgage in the

principal sum of $20,000. In 1917, after her marriage, she caused this mortgage to be assigned, through an intermediary, to "Joseph Polizzo (her husband) and Amelia Anna Polizzo, his wife (herself) * * * to have and to hold * * * and to the(ir) successors, legal representatives the survivor, such survivor's heirs, assigns * * *." In 1928, she was admitted to Kings Park State Hospital, and in 1945, her husband was appointed her committee. In 1947, for a valuable consideration, the husband assigned to Harrison B. Wright, who subsequently became the executor of his estate, "all of my right, title and interest, being a one-half share or interest therein, of, in and to * * *" the mortgage in question. Thereafter, the husband predeceased the wife. The order judicially settling the final account of said deceased committee adjudged that the husband had only received a right of survivorship in the mortgage and, having predeceased the wife, no interest passed to his assignee (Wright) under his assignment. Wright appeals, individually and as executor of the husband. Order modified on the law as indicated herein and, as so modified, unanimously affirmed, with costs to all parties filing briefs, payable out of the estate, and matter remitted to the Special Term for the entry of an order not inconsistent herewith. The findings of fact are affirmed. The assignment to the husband and wife, by its terms, created a joint tenancy in the mortgage (Real Property Law, sec. 66, Matter of Kimberly, 150 N. Y. 90; Matter of Blumenthal, 236 N. Y., 448), whereunder each owned an undivided one-half interest therein (Matter of McKelway, 221 N. Y., 15, 19). Said tenancy was terminated by the husband's assignment of his interest to Wright, whereby the latter and said wife became tenants in common (Matter of Suter, 258 N. Y., 104, 106; Matter of McKelway, supra). As for the unpaid balance of the consideration for said assignment to Wright, that remains to be accounted for in the husband's estate.

Appendix A.

Opinion dated July 24, 1951.

By Mr. Justice Daly

Matter of Polizzo (Polizzo)—The surety on the bond of one Joseph Polizzo, deceased committee of the estate of his wife, Minnie Polizzo, an incompetent person, has moved to punish the executor of the estate of said Joseph Polizzo for contempt for failure to file an account of all the acts and proceedings of said Joseph Polizzo, from the date of his appointment as committee to the date of his death, as directed by order of this court entered on November 23, 1949. The executor has moved for judicial settlement of the account as filed.

One objection has been raised by the special guardian against the account filed, to wit, the statement therein that the incompetent has a one-half interest in a certain mortgage.

The mortgage in question in the sum of $20,000 was executed by one Gus W. Solkey to John E. Wigger and Amelia Anna Wigger on August 16, 1912. Upon the death of her husband, Amelia purchased his undivided one-half interest in the mortgage from his executor for a stated consideration of $10,000. Thereafter, Amelia and Joseph Polizzo were married. Shortly after her marriage to Joseph, to wit, on August 14, 1917, Amelia assigned the mortgage to one Louis M. Bautz, an attorney, who in turn, on that same day "for and in consideration of other good and valuable consideration, and the sum of One Hundred ($100) Dollars," assigned the mortgage to "Joseph Polizzo and Amelia Anna Polizzo, his wife, parties of the second part * * * To Have and To Hold the same to (said parties), the survivor, such survivor's heirs, assigns * * * forever * * * On October 8, 1945, Amelia (referred to in these proceedings as Minnie) was adjudicated an incompetent

person and her husband appointed her committee, in which capacity he served until his death on November 2, 1948. Prior to his death, namely, on September 10, 1947, Joseph Polizzo assigned what he apparently considered to be his one-half interest in the mortgage in question to his attorney, the present executor of his estate. The stated consideration for that assignment was $8,500 (the mortgage having been reduced to $17,000) only part of which, however, was paid and that part in the form of installment payments at various times. The validity of that assignment is now in question.

The assignment of August 14, 1917, from Bautz to the incompetent and her now deceased husband did not create a joint tenancy in the strict sense, but a tenancy analogous to a joint tenancy, namely, one in which the entire interest in the mortgage was to pass to the survivor (Matter of Kane, 246 N. Y., 498; Belfanc v. Belfanc, 252 App. Div. 453; aff'd 278 N. Y., 563; Matter of Conklin, 259 App. Div. 432), but in which the wife, during her life, retained the complete ownership, control and right of disposition (Belfanc, *supra*). It follows, therefore, that the assignment by Joseph Polizzo, who predeceased his wife, of a one-half interest in the mortgage was invalid, and that the entire interest in said mortgage is in the incompetent.

This court is not unmindful of the fact that straightened financial circumstances of the deceased husband of the incompetent may have been instrumental in the execution of the assignment. He was not, however, without a remedy to obtain support for himself if such support was required (C. P. A., sec. 1357).

The motion to punish for contempt is denied on condition that the account be settled in accordance with this opinion. Leave is granted to the attorney for, and executor of the estate of, the deceased committee to submit an affidavit supplementing the account to show a computation of commissions and disbursements due to said committee.

Settle order.

APPENDIX B.

Remittitur

COURT OF APPEALS

STATE OF NEW YORK, ss.:

PLEAS in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 26th day of May, in the year of our Lord one thousand nine hundred and fifty-five, before the Judges of said Court.

Witness: The Hon. ALBERT CONWAY, Chief Judge, Presiding.

RAYMOND J. CANNON, Clerk.

REMITTITUR, May 26, 1955.

No. 32

IN THE MATTER

of the

Final Account of Proceedings of JOSEPH POLIZZO, as Committee of the Estate of MINNIE POLIZZO, an incompetent person and an inmate of the Pilgrim State Hospital. HARRISON B. WRIGHT, individually and as Executor of the Last Will and Testament of Joseph Polizzo, Deceased,

Respondent,

AGNES W. TYMANN, as Administratrix of the Estate of Minnie Polizzo, Deceased,

Appellant,

CENTURY INDEMNITY COMPANY,

Nominal Party.

Be it Remembered, That on the 11th day of February, in the year of our Lord one thousand nine hundred and

fifty-five, Agnes W. Tymann, as Administratrix of the Estate of Minnie Polizzo, Deceased, the appellant—in this cause, came here unto the Court of Appeals, by William B. Hoffman, her attorney—and filed in the said Court a Notice of Appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the Second Judicial Department. And Harrison B. Wright, individually and as Executor of the Last Will and Testament of Joseph Polizzo, Deceased, the respondent—in said cause, afterwards appeared in said Court of Appeals in person, as Executor, and by Robert F. Tomlin, as attorney for Harrison B. Wright, individually.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

Whereupon, the said Court of Appeals having heard this cause argued by Mr. William B. Hoffman of counsel for the appellant—and by Mr. Harrison B. Wright, in person, for the respondent, and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed, with costs to all parties appearing separately and filing separate briefs payable out of the estate.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the said Supreme Court, there to be proceeded upon according to law.

Therefore, it is considered that the said order be affirmed, with costs and, as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, accord-

ing to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, and Raymond J. Cannon, Clerk of the Court of Appeals of the State of New York.

Court of Appeals, Clerk's Office,

Albany, May 26, 1955.

I Hereby Certify, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

Raymond J. Cannon,

Clerk.

Appendix B.

Order Denying Motion for Reargument

STATE OF NEW YORK,

IN COURT OF APPEALS

At a Court of Appeals for the State of New York held at Court of Appeals Hall in the City of Albany, on the eighth day of July A. D., 1955.

Present: Hon. ALBERT CONWAY, Chief Judge, Presiding.

Mo. No. 288

IN THE MATTER

of the

Final Account of Proceedings of JOSEPH POLIZZO, as Committee of the Estate of MINNIE POLIZZO, an incompetent person and an inmate of the Pilgrim State Hospital. HARRISON B. WRIGHT, individually and as Executor of the Last Will and Testament of Joseph Polizzo, Deceased,

Respondent,

AGNES W. TYMANN, as Administratrix of the Estate of Minnie Polizzo, Deceased,

Appellant,

CENTURY INDEMNITY COMPANY,

Nominal Party.

A motion for reargument or, in the alternative, to amend the remittitur in the above cause having been here-

tofore made upon the part of the appellant herein, papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied.

A copy,

GEARON KIMBALL,
Deputy Clerk.

MISCELLANEOUS

Notice of Motion

COURT OF APPEALS,

OF THE STATE OF NEW YORK.

IN THE MATTER

of

The Final Account of the Proceedings of Joseph Polizzo, as Committee of the Estate of MINNIE POLIZZO, an Incompetent Person and an Inmate of Pilgrim State Hospital.

HARRISON B. WRIGHT, individually and as Executor of the Last Will and Testament of JOSEPH POLIZZO, deceased,

Respondent,

AGNES W. TYMANN, as Administratrix of the Estate of Minnie Polizzo, deceased,

Appellant,

CENTURY INDEMNITY COMPANY,

Nominal Party.

SIR:

PLEASE TAKE NOTICE that upon the annexed brief and upon all the papers upon which the appeal in the above entitled action was heard and decided by this Court, to wit: the

case on appeal and the briefs of the parties, and upon the remittitur of this Court filed with the Clerk of the County of Nassau on the 10th day of June, 1955, by which it appears that this Court affirmed the judgments of the Appellate Division, Second Department from which this appeal was taken, and on all the proceedings heretofore had herein, the undersigned will move this Court at a term thereof to be held at the Courthouse, Court of Appeals Hall, Pine and Eagle Streets, Albany, New York, on the 8th day of July, 1955, at ten o'clock in the forenoon of that day, for an order granting leave to the appellant to reargue the appeal herein, or, in the alternative for an order amending the remittitur in the above entitled action to state the grounds of the decision of this Court in order to remove uncertainty, avoid litigation and make it appear to the Supreme Court of the United States upon application for a writ of certiorari whether or not a federal question was necessarily decided, and that the Clerk of the County of Nassau be directed to return to the Court of Appeals the remittitur now on file in his office for the purposes aforesaid, and for such other and further relief as may be just and proper in the premises.

Dated, June 8, 1955.

Yours, etc.,

WILLIAM B. HOFFMAN,
Attorney for Agnes W. Tymann, as Administratrix of the Estate of Minnie Polizzo, deceased, Appellant,
1517 Franklin Avenue,
Mineola, New York.

Miscellaneous.

To:

HARRISON B. WRIGHT, Esq.,
Attorney for himself as Executor
of Last Will and Testament of
Joseph Polizzo, deceased,
72 No. Village Avenue,
Rockville Centre, New York.

ROBERT F. TOMLIN, Esq.,
Attorney for Harrison B. Wright,
individually,
72 No. Village Avenue,
Rockville Centre, New York.

SAMUEL GOTTESMAN, Esq.,
Attorney for Century Indemnity Company,
20 Vesey Street,
New York 7, New York.

Miscellaneous.

COURT OF APPEALS,

OF THE STATE OF NEW YORK.

IN THE MATTER

of

The Final Account of the Proceedings of Joseph Polizzo, as Committee of the Estate of MINNIE POLIZZO, an Incompetent Person and an Inmate of Pilgrim State Hospital.

HARRISON B. WRIGHT, individually and as Executor of the Last Will and Testament of JOSEPH POLIZZO, deceased,

Respondent,

AGNES W. TYMANN, as Administratrix of the Estate of Minnie Polizzo, deceased,

Appellant,

CENTURY INDEMNITY COMPANY,

Nominal Party.

APPELLANT'S BRIEF FOR REARGUMENT

POINT ONE

Property of an incompetent in the joint names of the incompetent and another is in *Custodia Legis*.

Experience shows that the citizens of New York State hold much of their property in joint form. The 1954 edi-

tion of the Statistical Abstract of the United States at page 90 reports that at the end of the year 1951 there were 88,990 resident patients in mental institutions in New York State. At the present time, this figure is probably well over 100,000. These unfortunates undoubtedly own much joint property.

In this case, the question of protection of an incompetent's interest in joint property has been presented to this Court for the first time. In fact, counsel has been unable to find any case in point in the entire United States except the case of *Boehmer* v. *Boehmer* in Wisconsin. Reported at 264 Wis. 15, 58 N. W. 2nd 411.

The *Polizzo* case lays down a precedent holding that the rights of an incompetent to joint property are subject to no further protection than the rights of one in full possession of his faculties. This far reaching decision has been without discussion in the opinion and is contrary to the *Boehmer* case and to the well established rule of law that the Courts will zealously guard the interests of an incompetent.

The question of *Custodia Legis* of an incompetent's joint property was raised in Point One of appellant's brief. Perhaps, due to the limitations of the writer both in the brief and upon the oral argument, the Court has misapprehended the scope of this question of law.

Two questions of law were raised on this appeal (pp. 4 and 5 of Appellant's brief). The Court discussed Point Two alone. Point One is not subsidiary to Point Two thereof but was deliberately denominated Point One since it is the most important point in the case.

Apparently the Court felt that if there was no force in Point Two (which held that the husband of the incompetent had presumptively only a survivorship right) then

the incompetent suffered no injury when half of the chose in action was transferred by her husband without Court permission.

The question arises: How was Minnie Polizzo, the incompetent, damaged by the act of Joseph Polizzo if there was no presumption as to ownership by reason of the source of the funds creating the chose in action? The answer is that Minnie Polizzo was denied an opportunity to show what the true situation was as to ownership. She was unable to show actual intent by reason of her mental condition.

In 1947, when Joseph Polizzo transferred one-half of the bond and mortgage to Harrison B. Wright, Minnie Polizzo was in a mental institution. No one asked her if it was all right for her husband to make the transfer. In fact, her committee the party, who was supposed to look out for her interests was busy acting contrary to them. Minnie Polizzo, alone and friendless in a mental institution, was unable to come in to Court to show that she owned the whole chose in action. Yet the rule is well established in this State that in joint tenancies the parties may come into Court and show as between themselves what the financial equities of the parties are. One may have an infinitesimal share and the other for all practical purposes be the real owner.

Minnie Polizzo had no opportunity to show the purpose of the creation of the joint tenancy and the intention of the parties. The cases all hold that in a joint tenancy proof may be shown as to actual intent concerning the realities of ownership. This is illustrated in the majority opinion of this Court in this very case when the Court said at page 3 discussing Point Two:

> "The question seems to be of first impression in this Court. We might, therefore, choose the old

(husband to wife transfer) presumption *in absence of proof as to actual intent,* that survivorship only was intended."

It is fundamental that no incompetent in a mental institution can ever offer any proof as to the actual intent of the creation of a joint ownership of part of his property.

In the usual case concerning joint property, the joint owners can come into Court and show what their actual intent is.

Judge Van Voorhis concurred with Justice Shientag in the case of *Goldsmith* v. *Goldsmith,* 277 App. Div. 3, 97 N. Y. Sup. 2nd 597, when Justice Shientag said, discussing joint ownership:

"One may have an infinitesimal interest and the other for all practical purposes, be the real owner."

Other cases hold as follows:

West v. *McCullough,* 123 App. Div. 846, 849:

"The question then is one of intention, to be determined by presumption in absence of other proof."

Belfanc v. *Belfanc,* 252 App. Div. 453, 457:

"the question of the intention at the time of the transaction is the thing sought."

Matter of Porianda, 256 N. Y. 423, 425:

"this presumption is not conclusive and may be overcome by proof that the depositor when making the deposit had no intention to create a joint tenancy."

See also:

Walsh v. *Keenan,* 293 N. Y. 573;
Re Darashinsky, 145 Misc. 426, Affd. 239 App. Div. 830;
Cart v. *Cart,* 176 Misc. 457.

If in 1947, when Joseph Polizzo transferred one-half of the bond and mortgage, he had applied to the Court for permission the Court would have appointed a Special Guardian. The Special Guardian would investigate the situation and report to the Court the results of such investigation. The Court would have then approved of the sale or prohibited it. Then the rights of the incompetent would have been protected. This is why joint property of an incompetent and another must be in custody of the Court. Since this was not done the transaction was voidable by a duly constituted representative of Minnie Polizzo. The Special Guardian in the final accounting proceeding did elect to void such transaction.

POINT TWO

The holding of the majority of the Court does violence to the State and Federal Constitutions.

Article XIV, Section 1 of United States Constitution provides:

> "Nor shall any state deny to any person within its jurisdiction the equal protection of the laws."

Article 1, Section 11 of the New York State Constitution provides:

> "No person shall be denied equal protection of the law of this state or any subdivision thereof."

Miscellaneous.

The *Polizzo* case holds that funds of a married woman shall not be accorded equal treatment to the funds of a married man. This is patently unconstitutional. In the event that the *Polizzo* case is not modified the remittitur should be amended so as to show that a constitutional question has been passed upon.

See:

Gastenau v. *Commonwealth*, 108 Ky. 473, 56 S. W. 705;
State v. *Nelson*, 10 Idaho 522, 79 Pac. 79.

CONCLUSION

The decision in the *Polizzo* case should be modified so as to protect the rights of incompetents.

Unless the decision in this matter is modified a great injustice will be done to all incompetents in New York State. Commitment to an asylum will automatically subject them to deprivation of a moiety of their joint estates without any opportunity to show the realities of ownership.

Respectfully submitted,

WILLIAM B. HOFFMAN,
Attorney for Agnes W. Tymann,
as Administratrix of the Estate
of Minnie Polizzo.

Office - Supreme Court
NOV 13 1955
HAROLD B. WILLEY,

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 446

IN THE MATTER

of

The Accounting of Joseph Polizzo, as Committee of the Estate of MINNIE POLIZZO, an Incompetent.

AGNES W. TYMANN, as Administratrix of the Estate of MINNIE POLIZZO, Deceased,

Petitioner,

HARRISON B. WRIGHT, Individually, and as Executor of JOSEPH POLIZZO, Deceased, *et al.*,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO NASSAU COUNTY SUPREME COURT OF NEW YORK STATE AND TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

HARRISON B. WRIGHT,
Individually and as Executor of the Estate of Joseph Polizzo, deceased,
Respondent,
72 North Village Avenue,
Rockville Centre, N. Y.

RO 6—0880.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No.

IN THE MATTER

of

The Accounting of Joseph Polizzo, as Committee of the Estate of MINNIE POLIZZO, an Incompetent.

AGNES W. TYMANN, as Administratrix of the Estate of MINNIE POLIZZO, Deceased,

Petitioner,

HARRISON B. WRIGHT, Individually, and as Executor of JOSEPH POLIZZO, Deceased, et al.,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO NASSAU COUNTY SUPREME COURT OF NEW YORK STATE AND TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

Facts

Prior to her marriage to Joseph Polizzo, Amelia Anna Polizzo (also known as Minnie Polizzo) held a bond and mortgage in her own name. In 1917 she assigned the bond and mortgage first to an attorney, who immediately by assignment of even date assigned the bond and mortgage to

"Joseph Polizzo and Amelia Anna Polizzo, his wife." Both assignments recited a consideration "of other good and valuable consideration and the sum of one hundred dollars", and were in the usual form excepting that in the assignment to Polizzo and his wife the habendum clause read "to the successors, legal representatives the survivor, such survivor's heirs, assigns of the party of the second part."

Eleven years later Amelia Anna or Minnie Polizzo was committed to a State mental institution. Some years later Joseph Polizzo, her husband, was duly appointed her Committee. By assignment dated September 10, 1947, Joseph Polizzo assigned "all of my right, title and interest, *being a one-half share or interest therein*" in said mortgage, the principal of which had been reduced to $17,000, to Harrison B. Wright, which assignment recites that a full considera tion of $8,500 had been paid. On the hearing before the Trial Court the question of consideration was not involved as that question had not been raised by the Special Guardian. The petition (p. 3, third paragraph) says "The recited consideration of $8,500 was not paid (116)." That is an absolute misstatement. The consideration was paid. That it is a misstatement the page of the Record on Appeal to which petitioner refers shows. Whether it was or not is immaterial in this case and was not considered by any of the State Cou 's. The Appellate Division (Opinion of Appellate Division, appendix A, p. 21, bottom) says: "As for the unpaid balance of the consideration for said assignment to Wright, that remains to be accounted for in the husband's estate."

The sole objection of William B. Hoffman, then Special Guardian for Minnie Polizzo and now counsel for the petitioner herein, to the executor's account of the proceedings of the deceased Committee, was that there was included in that account only a one-half interest in the said bond and mortgage rather than the full interest therein, the Special Guardian's contention being that Joseph Polizzo received

nothing under the assignment to himself and his wife other than ownership in the event that he survived his wife. There was a long delay in the probate of the will due to inability to locate heirs and next of kin, and the account as filed was approved in every respect and with no objection other than the above. Actually Joseph Polizzo himself left no estate other than what remained unpaid to him under the agreement for the purchase of this assignment.

The Sole Question of Law Involved

The basic question involved is simply this: Under the assignment of mortgage to "Joseph Polizzo and Amelia Anna Polizzo, his wife", there having been included in the habendum clause the words "survivor, survivors" etc., did Joseph Polizzo receive the right to sell, transfer and assign an undivided one-half interest in the bond and mortgage?

In New York State there are but two estates in personal property. It is held either as tenants in common or as joint tenants. There is no "tenancy by the entirety" in personal property. Personal property can, of course, be held in a different manner provided it is done by agreement. Joseph Polizzo and his wife were not tenants in common. The use of the words "survivor, survivors" created the right of survivorship, which is the distinguishing feature as between tenants in common and joint tenants. Under a joint tenancy, if the property is continued to be held until the death of one tenant, the survivor takes. But it is unquestionably the law of the State of New York that a joint tenant may sever the tenancy by selling or transferring his interest in the jointly-held property, and if there are but two joint tenants that interest is an undivided one-half, and the assignee of a joint tenant then becomes a tenant in common with the other original joint tenant. That is exactly what happened in this case. Amelia Anna or Minnie Polizzo became a tenant in common with Harrison B. Wright.

The Special Guardian for the incompetent (now the attorney for the petitioner) and the Trial Court described Mr. and Mrs. Polizzo as joint tenants but at the same time argued that it was not strictly a joint tenancy but analogous to a joint tenancy, or in effect an exception to the rule, claiming that there is a presumption in the law of New York State that when a husband owning personal property purchased entirely with his own funds assigns that personal property to himself and his wife under an assignment absolute on its face, he nevertheless intends not to assign to his wife any absolute interest but at all times retains "sole ownership, control, and right of disposition" as to both principal and income during his lifetime, and that all he "intends" to give his wife is the right to take by survivorship if she happens to survive him and he has not previously disposed of the property. At no time did the Special Guardian or the Trial Justice point out the reason or source of this exception or show why this particular case came within such an exception if it existed. And both the Appellate Division of the Supreme Court of New York, Second Department, and the Court of Appeals found that such presumption, if existing, does not apply to a transfer by a wife to a husband.

Under the various statutes which have been adopted in the State of New York a man and his wife may deal one with the other as fully and as freely as any two persons may deal with one another. They may convey to one another without restriction. To say in this age that when a man owning property transfers by written assignment that property to himself and his wife without any restricting clause, he means and intends that he is still to be the sole owner of that property, is neither reasonable nor logical.

At common law a husband could transfer and convey nothing to his wife. Any attempt to do so was a nullity and he retained full ownership, control and right of dis-

position. A wife could neither take, hold nor transfer property. She had none. But in a case where a husband owning certain securities which he had purchased with his own funds made a written assignment of those securities to the names of himself and his wife, and continued to hold those securities in that fashion until his death, a Court of Equity, when the widow claimed by right of survivorship, held that while the husband as a matter of law retained full ownership, control and right of disposition while he lived, nevertheless he must have intended to provide for and give some rights in the property to his wife and so, as in many other cases where the Courts of Equity found the narrow rules of the common law inequitable, held that there was a "presumption" of the intention upon the part of the husband that his wife, while receiving no rights during his lifetime, was to take the property if she survived him.

Under the common law there was no "presumption" that the husband intended to retain full ownership, control and right of disposition. Under the law he had full ownership and could not transfer it to his wife. The only fiction which the Court invoked was the "presumption" that the husband intended his wife to take through survivorship.

At common law a "presumption" as held by the Trial Court to exist and as argued by the Special Guardian in this case could not have applied to a transfer by a wife. A wife had no ownership to be transferred to her husband or any other person. All ownership being in her husband, she could neither take, hold nor transfer either ownership or right of survivorship, and so certainly could not have had any "presumed" intention.

Question Presented

It is respectfully submitted that if there is any constitutional question here, it is as follows: "Is it a denial of equal protection of the law to hold that a transfer of a

bond and mortgage, without consideration, by a husband to himself and his wife creates a presumption that he intended to retain sole ownership, control and right of disposition of the bond and mortgage during his lifetime and intended to give her only a right of survivorship, and that a like transfer of a bond and mortgage by a wife to her husband and herself does not raise such a presumption?"

Reasons for Not Granting Writ

I

The question was not properly presented.

This alleged constitutional question was not raised at any stage of the proceedings in the Supreme Court of the State of New York or in the Appellate Division of that Court or in the Court of Appeals until the petitioner moved in the Court of Appeals, after its decision, for reargument. And it was not then raised by the notice of motion but only in the brief submitted by the petitioner on the motion. The motion for reargument was denied. This question not having been raised before the Trial Court or in the Appellate Division or in the Court of Appeals until after its final decision, there was no opportunity for any of these Courts to properly pass upon the question or for the respondents to meet the question.

II

Petitioner argues that it is the law of New York State that where a husband assigns a mortgage to himself and his wife, without consideration, a presumption arises that:

1. A right of survivorship is created in the wife.
2. He intends to retain ownership, control and right of disposition in himself.

The question of a presumption as to survivorship does not arise in this case. The words of survivorship in the habendum clause of the assignment in question created a right of survivorship in both husband and wife. No presumption is necessary.

The question of retention of ownership, control and right of disposition does arise in this case, and respondent emphatically contends that such a presumption of intention is not the law of New York State, whether it be a husband or wife who makes the transfer.

All cases cited in the briefs and opinions in this proceeding are cases where the husband had died and all deal with the question of survivorship only excepting the case of *Belfanc* v. *Belfanc*, 252 App. Div. 453, aff'd 278 N. Y. 563 (relied upon by the Trial Court and petitioner as authority for the alleged presumption). In that case the husband was alive, was the one who made the transfer and this alleged "presumption" was advanced in his behalf. The holding that there is such a presumption of ownership, if there was such a holding in that case, was not necessary to the decision of the Court for the reason that the facts were established by the uncontradicted testimony of the husband, of the lawyer who drew the instrument in question and of the wife herself, who was claiming a one-half interest as against her husband.

And so the *Belfanc* case is not authority for the existence of such a rule in New York. From the above it follows that the decision of the Court of Appeals in the present case that Minnie Polizzo, the wife, did not retain ownership, control and right of disposition, did not deny equal protection of the laws to her since the same rule applies to the husband.

The petitioner (p. 4) states that the Court of Appeals held in the present case that a transfer by a husband to himself and his wife, without payment of any considera-

tion, in the absence of any proof to the contrary, creates a presumption that the wife is to have survivorship rights only. Petitioner undoubtedly refers to the statement in the prevailing opinion in the Court of Appeals (p. 10, appendix A) to that effect, citing certain cases including *Belfanc* v. *Belfanc* which is discussed above. In all of these cases excepting the *Belfanc* case the husband who made the transfer had died and the question of present ownership was not involved. It is respectfully submitted that that statement was not necessary to the decision in this case which did not involve a transfer by a husband but which involved a transfer by a wife.

III

If the Court of Appeals of the State of New York, relying solely upon the "presumption of intention" alleged by the petitioner to exist in favor of a husband, in a case where there was no other evidence of the existing intention, and respondent believes that there is no such case, has ever held that there is a presumption that a husband retains ownership, control and right of disposition, then it is respectfully submitted that any such holding in favor of a husband was unconstitutional as it would have discriminated as against the wife.

As hereinbefore shown and is claimed by the petitioner, the basis for the alleged presumption lies in the old common law due to the fact that the husband then had sole ownership of all properties. The passage of the Married Women's Acts eliminated this particular segment of the common law (*Hiles* v. *Fisher,* 144 N. Y. 306, at pages 314 and 315), and further as stated in the petition herein (p. 6), the common law rule no longer has any existence and "regardless of whether this common law rule is in existence or not, when the common law is contrary to the Constitution of the United States, the common law must yield."

IV

The petition (p. 5, third paragraph) says that it is true that a State can make a distinction in the law between men and women but such distinction must be founded upon a reasonable basis, having in mind the general welfare of (or ?) public morals.

If the Court of Appeals has at some prior time decided that the husband had this right which his wife did not have, then should it not be assumed that the Court had a reasonable basis for the distinction? Might not that reason have been that the law has always held that the husband is responsible for his wife's support and therefore in making any transfer of property in which he intended to give her some interest he still, being liable for her support, wanted to safeguard himself as well as his wife? Would not such reasoning be justifiable? And if that is a sound reason then the holding in favor of the husband would not be arbitrary and not unconstitutional.

V

Under the established law of the State of New York there are but two tenancies in personal property, in common and joint. Under either tenancy one tenant may transfer to a third person an equal undivided one-half interest in the property. The only distinction between the two tenancies is that if a joint tenant does not sever the tenancy during the joint lives, then the survivor takes the whole. Under the Married Women's Acts in the State of New York, married women may own and deal with their personal or real property with the same freedom that a man may deal with his property, with any person including their husbands.

In the instant case the Court of Appeals has held that a wife may make a transfer to her husband and herself

as joint tenants, which is a right that all citizens of New York have. The Court of Appeals has simply decided that the wife may create a joint tenancy. That is not unconstitutional.

CONCLUSION

The petition for writ of certiorari should not be granted.

Respectfully submitted,

HARRISON B. WRIGHT,
Individually and as Executor of the Estate of Joseph Polizzo, deceased,
Respondent.

CERTIORARI

DENIED